

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF FLORIDA PANAMA CITY DIVISION

RAMON ARMAS BERRATO, JR.

INMATE # X27467

Plaintiff

vs.

CASE No. 5:04 CV 165 - RH/W

L. McDONALD, HA. PATE, M. SPEIGHT

C. MCKENZIE, JANE DOE, NURSE KENT

OFFICE CLERK
U.S. DISTRICT CT.
NORTHERN DIST. FLA.
TALLAHASSEE, FLA.

03/22/05 MAR 22 PM 1:30

FILED

PLAINTIFF'S RESPONSE TO DEFENDANTS RESPONSE TO MARCH 1, 2005 ORDER

PLAINTIFF, pro se, responds to the Defendants Response to MARCH 1, 2005 order.

STATEMENT OF FACTS

1. Plaintiff was the victim of Assault and battery which violates his 8th Amendment on 11/28/02.
2. The plaintiff on 11/29/02 at approximately 1:AM filed a sworn affidavit concerning the assault and battery which occurred on 11/28/02.
3. Plaintiff was threatened by Lt. Copeland, Sgt. McKenzie, and Ofc. Speight, in the presence of cell mate David Blake Brooks uc# 982 838 concerning this incident.
4. On 12/2/02 Plaintiff filled out a Doc 305 for formal grievance (emergency grievance) let his cellmate at that time DAVID BLAKE BROOKS proof read it, and placed it in the prisons internal mailing system to be mailed directly to the secretary, of Florida Department of Corrections (F.D.C.) all in the presence of said cellmate David Blake Brooks
5. Plaintiff was placed in an S.O.S cell due to his cutting his wrist due to fear of further abuse after threats.
6. On 12/6/02 A John Doe Captain and Jane Doe nurse visited plaintiff while in the S.O.S cell.
7. Captain John Doe had the plaintiffs grievance concerning this action in his hand when it should have been mailed to the Secretary of F.D.C.
8. Captain John Doe presented me with said grievance and questioned the plaintiff.
9. Nurse JANE DOE was told by Captain John Doe to examine the plaintiff for injuries.
10. Nurse JANE DOE advised Captain John Doe that the bruises were in fact caused by punches.
11. Plaintiff on 12/19/02 was interviewed by Inspector KRAUS from the Inspector Generals office where he gave a sworn statement which was recorded concerning this action.
12. Due to the evidence Inspector KRAUS had the plaintiff immediately transferred from Washington C.F. to Santa ROSA C.F.

13. Plaintiff never received response to the emergency grievance he filed at Washington C.I. concerning this action.

14. Due to the fact that Exhibit A the grievance receipt was dated 12/3/02 and normally such receipts are dated the same day or next day the grievance is filed the plaintiff was under the impression that this receipt pertained to the grievance filed in this action.

15. Plaintiff filed another Emergency Grievance to the Secretary of F.D.O.C. concerning this action.

16. Plaintiff never received a response to the second Emergency Grievance.

ARGUMENT

① Plaintiff did in fact exhaust administrative remedies.

The plaintiff on two separate occasions did in fact file Emergency Grievances to the Secretary of F.D.O.C., the highest level attempting to exhaust Administrative Remedies. These grievances were never responded to. After the grievances left the plaintiff's hands entering the prison's internal mailing system they were no longer in his control, and the plaintiff cannot make officials responded to said grievances. The plaintiff claims as he did in his initial complaint that he attempted to file two separate grievances, putting forth due diligence in an attempt to comply with the Prison Litigation Reform Act 42 U.S.C. § 1997e(a) exhaustion requirements. The fact that the prison officials chose not to answer said grievances was probably a premeditated attempt by the F.D.O.C. to prevent the present action and were out of the plaintiff's control. When prison officials do not respond to a prisoner's initial grievance, administrative remedies are exhausted. See Polve v. Ennis 177 F.3d 393 (5th Cir. 1999); Lewis v. Washington 300 F.3d 529 (7th Cir. 2002); and Nyhuis v. Reno 204 F.3d 65 (3rd Cir. 2000).

If the Plaintiff would not have put forth due diligence then the defendant's motion to dismiss would be feasible, but that is not the case in this matter. Therefore since the plaintiff claims that he did in fact file 2 separate grievances putting prison officials on notice of these claims, the defendant's motion to dismiss, must be dismissed and this action claim should be looked at in light most favorable to the plaintiff and to a trial. Further more due to the fact that the plaintiff was visited on 12/6/02 by a Captain John Doe who possessed said emergency grievance which was suppose to have gone directly to the Secretary of F.D.O.C., it can be deduced that the prison purposely curbed the processing of said emergency grievance which should have never remained at the institution. Due to the facts of the case being in dispute the facts case must proceed to trial.

CONCLUSION

Due to the fact that the plaintiff did exert due diligence in attempting to exhaust administrative remedies by filing grievances on two separate occasions this action must proceed and the Defendants Motion to dismiss for failure to exhaust administrative remedies, must be dismissed.

Respectfully submitted,

RL RB

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing has been turned into the hands of an institutions officials to be mailed U.S.P.S postage pre-paid to:

Caryl Kilinski

Office of the Attorney General

The Capitol, Suite PL-01

Tallahassee, FL 32399-1050

On this 16TH day of MARCH, 2005.

RL RB

Ramon Borrero X27467

Florida State Prison B 1205

7819 N.W. 228TH St.

Rainford, FL 32026

LEGAL MAIL
PROVIDED TO
FLORIDA STATE PRISON
DATE 3-16-05 FOR MAILING.
INMATES INITIALS RB